Supreme Court, U.S.
FILED
OCT 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-660

In The
Supreme Court of the United States
October Term, 1985

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THE STATE OF COLORADO,
Petitioner,
vs.
FRANCIS BARRY CONNELLY,
Respondent.

o

On Writ Of Certiorari To The Colorado Supreme Court

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BRIEF OF AMICI IN SUPPORT OF THE PETITION BY THE COLORADO ATTORNEY GENERAL AND THE TWENTY-SIX AMICI THAT APPEAR ON THE INSIDE COVER

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QUESTIONS PRESENTED FOR REVIEW

1. Must a reliable and completely unsolicited confession of murder by someone not even known to or suspected by the police be suppressed as involuntary because the defendant believed that God told him to make it?

2. Does moral or psychological pressure to confess emanating from a source other than official coercion make ineffective a waiver of *Miranda* rights and require suppression of subsequent elaboration by the defendant after *Miranda* warnings?

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McCormick on Evidence, ch. 14 (E. Cleary 3 ed. 1984)

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BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

—o—

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INTEREST OF THE AMICI CURIAE

The amici curiae have a substantial interest in seeing this holding reviewed because they are all officers or organizations of officers with law enforcement responsibilities in their respective jurisdictions. The holding of the Colorado court purports to construe the prior holdings of this court and the fifth and fourteenth amendments of the United States Constitution, which are binding law on all of the amici curiae.

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STATEMENT OF THE CASE

The defendant, Francis Connelly, was charged with second-degree murder in Denver. On interlocutory appeal by the Denver district attorney, the Colorado Supreme Court upheld suppression of the defendant's confession.

The defendant came up to a uniformed policeman in downtown Denver and said he had killed someone and wanted to tell the officer about it. After being warned of his rights, the defendant told the officer that he had killed a young girl he was traveling with in 1982. The officer called the Denver Police Department, which sent a detective who confirmed that a body had been found. The defendant then gave the name of the victim and showed how and where he committed the murder and disposed of the body.

A psychiatrist testified that the defendant experienced the voice of God telling him to go to Denver from Boston and confess or commit suicide. The doctor said that the defendant was suffering from chronic paranoid schizophrenia and his statements resulted from "command auditory hallucinations," which made him feel as if he had to do what the voice told him.

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REASONS FOR ALLOWING THE WRIT

This court should issue its writ and review the holding of the Colorado Supreme Court because it has decided an important question of United States Constitutional law with far-reaching implications for the use of confessions in criminal trials, and it has done so in a way that by all indications would not be sanctioned by this court. The case presents a rare opportunity for review because its facts do not permit a narrow resolution of the questions presented. It rests precisely at a fork in the development of the law of confessions and demands a decision along major doctrinal lines that will likely clarify prior holdings as well as affect future development. The procedural posture of the case (appeal from pretrial suppression order) and the lack of factual dispute make it unlikely that the ultimate rule of decision would involve issues that are not already apparent.

The Colorado court's suppression of the initial, unsolicited confession stands squarely for the proposition that the "'old' due process voluntariness test," *see Oregon v. Elstad*, 105 S. Ct. 1285 (1985), requires suppression in some cases even though there are strong indications of reliability and the confession is not the result of any "police practices" whatsoever. While a "complex of values" underlie the strictures against use by the state of involuntary confessions, *Blackburn v. Alabama*, 361 U.S. 199 (1960), the ultimate goal of suppression is to insure against unfair or improper treatment by the police in extracting confessions. The context in which such terms as "rational intellect" and "free will" have been used, *see, e.g., Townsend v. Sain*, 372 U.S. 293 (1963), makes this clear. This court has never decided a case or controversy in which it found the use of an unsolicited confession to be a violation of due process.

In this unusual case Colorado holds that the due process clause of the fourteenth amendment prohibits the *use* at trial of a confession not "voluntarily" given, whether or not official coercion was involved in getting the confession. The Colorado court did not discuss the reasons why confessions made under moral or psychological pressure should be suppressed. Instead it shifted the inquiry from the *content* of the "complex of values" involved in the due process component of the voluntariness standard to the *applicability* of the fourteenth amendment. Rather than deciding whether use of the evidence at trial is the type of state action prohibited by the due process clause, it decided simply that use of the evidence at trial is sufficient state action to make the due process clause applicable.

After the defendant's initial confession he was warned of his *Miranda* rights. His further elaboration about the murder was suppressed for the reason that psychological pressure from within made his waiver of *Miranda* rights ineffective. The effects of this second holding are even broader than the first, involving a much larger class of confessions and touching upon the standard for waiver of a constitutional right generally.

Questions about violation of *Miranda* rights have been analyzed by this court in terms of the fifth amendment's privilege against compelled self-incrimination. Whether or not voluntary waiver of *Miranda* rights is anything other than making a voluntary confession, *see* McCormick on Evidence, sec. 153 (E. Cleary 3d ed. 1984), recent holdings of this court make clear that the fifth amendment is not "concerned with moral and psychological pressures to confess emanating from sources other than official coercion." *Oregon v. Elstad, supra,* at 1291.

Despite the per se rules of exclusion adopted in *Miranda v. Arizona*, 384 U.S. 436 (1966), the voluntariness standard has remained important in three situations: 1) where *Miranda* rights were not violated; 2) where statements are suppressed but might be used for impeachment of a testifying defendant; and (3) where statements are made in violation of *Miranda* but are subsequently made again after compliance with *Miranda*. *Oregon v. Elstad, supra*. Nevertheless, growth of the old voluntariness standard by this court has been stunted, if not brought to a complete standstill, by the parallel standards developed as a result of the holding of *Miranda*.

For years, lower courts and commentators have bemoaned the absence of any clear expression by this court of the relationship that was intended between the rights to be vindicated by the old voluntariness standard and the rights to be vindicated by the per se rules of exclusion of *Miranda*, asking whether they are the same or even whether the one is a subset of the other, and questioning whether due process should be addressed as a matter of voluntariness at all and, if so, whether the standard of due process should depend upon the strength of will of any particular individual. *See generally* Schulhofer, *Confessions and the Court*, 79 Mich. L. Rev. 865 (1981); Grano, *Voluntariness, Free Will and the Law of Confessions*, 65 U. Va. L. R. 859 (1979); *McCormick on Evidence*, ch. 14 (E. Cleary 3d ed. 1984).

By suppressing a confession the reliability of which is not seriously questioned and which was clearly not extracted by police practices, and by doing so in reliance upon both the fifth and fourteenth amendments to the United States Constitution, the holding of the Colorado

court presents an opportunity to define the limits of the due process component of the "old" voluntariness standard and to clarify the relationship between that standard and constitutional rights guaranteed by *Miranda*. The case captures the interest of lawyers and nonlawyers alike because the conflict involved is so fundamental that it literally compels either a satisfactory articulation of the competing interest to be advanced by suppression or an admission that the time has come to narrow any rule of decision that could require suppression here.

Respectfully submitted,

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